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IN THE

Supreme Court of the United States

October Term, 1968

No. 205.

MURCHISON AND COMPANY, a Delaware Corporation, and SUNRAY DX OIL COMPANY, a Delaware Corporation,
Petitioners,

v.

GLO CO., an Illinois Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

MURCHISON AND COMPANY, A DELAWARE CORPORATION, AND SUNRAY DX OIL COMPANY, A DELAWARE CORPORATION,

Petitioners

v.

GLO CO., AN ILLINOIS CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

A Writ of Certiorari is respectfully sought to review the order of the United States Court of Appeals for the Third Circuit reversing the order of the United States District Court for the District of Delaware.

OPINIONS BELOW.

Third Circuit. The opinion of the Court of Appeals dated December 20, 1967, reversing the dismissal by the District Court, has not been reported (Appendix A, *infra*, pp. A-1-A-3).

The majority and dissenting opinions of the Court of Appeals on rehearing dated March 20, 1968, reversing the dismissal by the District Court have not been reported (Appendix B, *infra*, pp. A-4-A-10).

District Court. The memorandum opinion of the District Court dismissing Respondent's cause is set forth in Appendix C, *infra*, pp. A-11-A-15; it was not reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit reversing the District Court's dismissal of the cause, was entered on December 20, 1967 (Appendix A, *infra*, p. A-3).

A timely petition for a rehearing was filed on January 3, 1968, and granted on February 1, 1968.

The judgment on rehearing, again reversing the District Court's discretionary order of dismissal, was entered on March 20, 1968 (Appendix B, *infra*, p. A-10).

QUESTIONS PRESENTED.

1. Whether a United States Court of Appeals may reverse a dismissal by a District Court for lack of prosecution where it is not found that the District Court abused its discretion.

2. Whether a United States Court of Appeals may reverse a dismissal by a District Court of an action which had been pending in the District Court for over eleven years without going substantially beyond the pleading stage and where plaintiff did nothing for more than one year after receiving a warning from the Court that dismissal might result from further inaction.

3. Whether a United States Court of Appeals may abrogate a standard local rule of the District Court governing prosecution of cases on its docket without finding either that the rule is *per se* invalid or that its particular application was an abuse of discretion.

STATUTES AND RULES INVOLVED.

Rule 1 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> ". . . They [Fed. R. Civ. P.] shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 41(b) of the Federal Rules of Civil Procedure, dealing with involuntary dismissals, provides in pertinent part as follows:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits."

Civil Rule 12 of the United States District Court for the District of Delaware, dealing with dismissal of actions for failure to prosecute, provides as follows:

> "Subject to the provisions of Rule 23(c), F. R. C. P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. An application for a continuance shall not be deemed to be action precluding such dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule."

STATEMENT OF THE CASE.

This action was begun on November 1, 1954, nearly twelve years before its dismissal by the District Court. Glo Co. sued Murchison and Company (hereinafter "Murchison") and Sunray DX Oil Company (hereinafter "Sunray") in the United States District Court for the District of Delaware for royalties allegedly due under written instruments dated September 29, 1941, and August 31, 1950, involving assignments of certain oil and gas rights in Texas. Jurisdiction was based on diversity of citizenship under 28 U. S. C. § 1332. Defendants joined issue on December 23, 1954 by filing answers denying the material allegations of the complaint.

In the following nine and one-half years nothing more of substance was accomplished. After the filing of the original complaint in 1954, there were periods of total inactivity of nine months, thirty-two months, twenty-one months, two years, and the final period of sixteen months preceding the rule to show cause: The case went nowhere. The "activity" which punctuated these periods of inactivity was token only and was inspired by calendar calls. Finally in September, 1964, the District Court, while declining to dismiss the action for failure to prosecute, gave plaintiff a stern warning of the consequences of its continued inaction. Despite that warning, which generated nothing but a further amended complaint, which defendants answered in January, 1965, no steps were taken to move the case to trial. On June 3, 1966, nearly a year and one-half after the amended answers had been filed, the District Court issued, *sua sponte*, a rule to show cause why the action should not be dismissed.

After a hearing, the Court on August 10, 1966, filed a memorandum opinion (Appendix C, pp. A-11-A-15) dismissing the case with prejudice. The opinion details the protracted history of the proceedings.

Plaintiff appealed, and the United States Court of Appeals for the Third Circuit reversed. Although noting that

"a dismissal of this case certainly appears justified by the inaction of counsel in failing to move for trial after repeated warnings by the court," the Court of Appeals reversed this discretionary act (Appendix A, pp. A-1-A-3). Defendants filed for and received a rehearing. The rehearing had been sought on the grounds of an erroneous factual premise,[1] the conflict with opinions of the United States Supreme Court, other Circuits (including a conflict within the Third Circuit) and the adverse effect upon the administration of justice. The opinion of the Court on rehearing again reversed and remanded without finding any abuse of discretion or without citing any reasons but referring only to "the unusual nature of the circumstances." (Appendix B, pp. A-4-A-5). There was a vigorous dissent by Circuit Judge Van Dusen clearly pointing out plaintiff's dilatory conduct in the case justifying the District Court's dismissal and concluding that there was "no abuse of discretion in the order of the district court dismissing this action." (Appendix B, pp. A-5-A-10).

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1. The erroneous factual premise in the first opinion of the Court of Appeals was stated as follows:

> "'As the Court recognized, there appears to be no dispute that an amount of money is owed to plaintiff under the contracts in suit.' The basis for this premise seems to be an oral observation made by Chief Judge Wright of the District Court during the course of the argument on the final rule to show cause. This observation was a remark made before the dismissal as to possible methods of preserving one minute claim of plaintiff's many alleged claims in view of the fact that Sunray, one of the defendants, had admitted in its answer owing plaintiff the sum of $3,624.45 and in the answer actually tendered that sum. Judge Wright followed through on his remark concerning the protection of this admitted small part of the claim, and before the order was entered dismissing the case the amount was paid in full and accepted by plaintiff. Therefore, as of the time of the dismissal nothing was owed by any defendant. Thus, the only factual premise upon which the Court predicated the reversal is erroneous."

This factual error is fully documented in the petition for reargument filed in the Court of Appeals, pages 4-6, footnotes 5 through 8.

REASONS FOR ALLOWING THE WRIT.

This decision of the Third Circuit is squarely in conflict with this Court's decision in *Link v. Wabash Railroad Co.*, 370 U. S. 626 (1962). It is in conflict with other Circuit Courts in the United States and is in conflict with other recent decisions within the Third Circuit itself.

If this decision is permitted to stand, it will have far-reaching adverse effects on the administration of justice in the District Courts of the United States.

1. The Decision Below Is in Conflict With Other Opinions of the Third Circuit, of the Other Circuits, and of This Court.

The Court below did not consider whether there was an abuse of discretion by the District Court. The Court of Appeals violated firmly established principles of judicial review in merely substituting its own judgment for that of the District Court. Judge Van Dusen's dissent points this out succinctly; "[a] careful review of this record discloses no abuse of discretion in the order of the district court dismissing this action." (Appendix B, p. A-10).

This was done even though the original opinion by the Court below stated:

> "The Court has a wide discretion as to penalties for failure of diligent prosecution. Lyford v. Carter, 274 F. 2d 815 (3rd Cir. 1960) [sic]. *A dismissal of this case certainly appears justified by the inaction of counsel in failing to move for trial after repeated warnings by the Court.*" (Appendix A, p. A-2), (Emphasis added)

Previous decisions of the United States Court of Appeals for the Third Circuit uphold the discretionary power of the District Courts to dismiss for lack of prosecution. *Kenney v. California Tanker Company,* 381 F. 2d 775 (3d Cir. 1967), cert. den. — U. S. —, 19 L. Ed. 2d 870 (1968) (specifically upholding the power of the District Court under the precise local rule involved here); *Torino v. Texaco, Inc.,* 378 F. 2d 268 (3d Cir. 1967). In *Kenney* the Court stated that "[a] myriad of cases could be cited for the proposition that we will not reverse the district court's dismissal absent a clear abuse of discretion, . . .", 381 F. 2d at 778. Such a holding is consistent with decisions of other courts of appeal. See, for example, *Esteva v. House of Seagram, Inc.,* 314 F. 2d 827 (7th Cir. 1963); *Grunewald v. Missouri Pacific Railroad Company,* 331 F. 2d 983 (8th Cir. 1964); *Fitzsimmons v. Gilpin,* 368 F. 2d 561 (9th Cir. 1966); *Davis v. Operation Amigo, Inc.,* 378 F. 2d 101 (10th Cir. 1967); *Schwarz v. United States,* 384 F. 2d 833 (2d Cir. 1967); *Durham v. Florida East Coast Railway Company,* 385 F. 2d 366 (5th Cir. 1967).

As this court has specifically stated:

> "Whether such an order [of dismissal] can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion." *Link v. Wabash Railroad Co., supra,* at 633.

The opinion below deprives the District Courts of any meaningful standards for exercise of their discretion when it states:

> "We have the utmost sympathy with the desire of the district court to enforce its Local Rule 12. However, after consideration of the complex factual circumstances of the case, we conclude with the greatest reluctance that in view of the unusual nature of the

> circumstances of this case the interest of justice will best be served by affording plaintiff an opportunity to prove its case at trial." (Appendix B, p. A-5)

Nowhere does the opinion identify or articulate the "unusual nature of the circumstances" to which it refers; nor does it set forth any standards to govern the District Courts.

Under this directive, a District Court could never dismiss a case for failure to prosecute if there were any "unusual circumstances", no matter how long the delay. The purpose of the grant of the discretionary power to trial courts is to enable them to administer justice and to regulate their dockets, under all circumstances—"unusual" or not. Indeed this is the policy of Rule 1, Fed. R. Civ. P.—to "secure the just, speedy and inexpensive determination of every action".

The decision below would seem to require an *ad hoc, de novo* hearing at the appellate level on the order of dismissal. However, under *Link v. Wabash Railroad Co., supra, Kenney v. California Tanker Company, supra,* and the other cases cited, *supra,* p. 7, a party is only entitled to a determination of whether the dismissal was within the range of discretion of the District Court. Thus, the decision below is in direct conflict with *Link, Kenney* and the decisions of the other circuits in that the Court of Appeals substituted its discretion for that of the District Court, contrary to the above standards.

2. Adverse Effect on Judicial Administration.

This is a petition to review a reversal of an order of dismissal by a District Court under Dist. Del. Civ. R. 12 and Fed. R. Civ. P. 41(b). This Court has held that a District Court judge has the authority and discretion to

dismiss, *sua sponte,* for failure to prosecute. *Link v. Wabash Railroad Co., supra.* The reason for vesting the District Courts with this discretion is to ". . . . prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts [, and] . . . to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. . . . [This] 'inherent power' [is] governed . . . by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Link v. Wabash Railroad Co., supra,* at 629-31.

With respect to delay and the administration of practice, the Chief Justice stated recently:

> "The orderly and expeditious processing of litigation is a right which each of us should be able to ask of our judicial system, no matter what our station in life or how meager or non-existent our resources may be. . . . .
>
> • • •
>
> "These are examples of instances where both bench and bar have failed in their duty to advance the cause of their clients and to fulfill the needs of society for the expeditious administration of justice. Such inaction not only clogs court dockets; it is grossly unfair to clients.
>
> • • •
>
> ". . . In some kinds of litigation, gaining delay after delay becomes a way of life. Delay becomes a tool by which many lawyers carry on their business and the more skillful they are in this regard, the more able they are reputed to be. While the profession does not generally condemn the practice, it does perpetrate in-

justice, and is an imposition on the court." Speech by Chief Justice Earl Warren, Sesquicentennial Banquet of the Law School of Harvard University, September 23, 1967, in 51 Judicature 196 (1968).

The District Courts' inherent power has been destroyed by the opinion below. No longer will courts be able to control their calendars or prevent dilatory tactics in the interest of the "expeditious administration of justice." District Courts will be without standards to dismiss a case. Knowing that the discretion of the Court of Appeals will be substituted for their discretion, the District Courts will lose control of their calendars. Procrastination and harassment by delay are honored above justice and efficiency when a court is stripped of its discretion to dismiss cases involving extraordinary inaction and delay. Local R. 12 and Fed. R. Civ. P. 41(b), specifically approved by this Court in *Link v. Wabash Railroad Co., supra,* are divested of all meaning and purpose by the decision below.

Indeed, a District Court Judge will look at this opinion with the established facts set forth in Judge Van Dusen's dissenting opinion and wonder if there could be a much more compelling case for dismissal. The reversal ordered by the majority opinion, however, will almost certainly leave such a judge at sea. If his case presents a fact situation less compelling for dismissal (and we respectfully venture to say that not many cases will be more compelling for dismissal than the instant case), he can hardly feel secure in dismissing. The inevitable result would seem to be a distinct tendency to keep stale cases on the dockets with a substantially diminished effective power to move them along. Even if some district judges will have the courage to dismiss, appeals will proliferate and Courts of Appeals will have similar difficulty in determining their scope of review.

CONCLUSION.

For the reasons stated above, the decision is in conflict with the decisions of this Court and the other circuits. The decision of the Court of Appeals also raises a question of vital importance in the administration of justice by District Courts. Therefore, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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